Petition

81-1643

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ROLAND WESLEY WEBER, FRED LEROY STRIMPEL, ANDREW HEPBURN McDOUGAL, MICHAEL SCOTT TICE, ROBERT EUGENE JACKSON,

PETITIONERS,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do crewmembers of a vessel have standing to contest seizure of charts from the wheelhouse of the vessel? Does the absence of those crewmen from the vessel at the time of seizure diminish their rights?

2. Does the request of an officer that an individual itemize the contents of the case, and partial compliance with such request, constitute a consent for an exploratory search by the officer?

3. Is a rolled-up rainslicker a "container" for purposes of invoking Fourth Amendment protections? Was the First Circuit in error in refusing to extend the decision in United States v. Robbins, 101 S.Ct. 2841 to the instant case?

4. Was the pretextual arrests of

petitioners Strimpel, McDougal, and Weber sufficient to mandate suppression of all evidence against them, including their identity?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Roland Wesley Weber, Fred Leroy Strimpel, Andrew Hepburn McDougal, Michael Scott Tice and Robert Eugene Jackson respectfully pray that

a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered January 4, 1982.

OPINION BELOW

The First Circuit Court of Appeals entered its published decision in case Nos. 80-1533 through 80-1540, on September 30, 1981. (A copy of the Opinion is attached as Exhibit "A"). The Court of Appeals entered its modified Opinion on December 28, 1981. (Exhibit "B"). The Court of Appeals denied the Petitions for Rehearing En Banc on January 4, 1982. (A copy of the Opinion is attached as Exhibit "C").

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

The United States Court of Appeals had jurisdiction under Title 28 U.S.C. § 1291 and § 1293(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment which provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seziures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

RELATED PARTIES AND CASES

On December 20, 1978, the petitioners and Jerry Samsel (80-1535), Mark Steven Tice (80-1536) and Franklin J. Lewis (80-1537) were indicted , inter alia, for conspiracy to import, and to possess with intent to distribute hashish, in violation of 21 U.S.C. § 846 and 21 U.S.C. § 963.

After trial by stipulated facts and judgment of guilty, petitioners and Samsel, Mark Steven Tice and Lewis appealed the denial of the suppression motions. The Court of Appeals affirmed petitioners' convictions but held that contrary to the District Court's ruling, co-appellants Samsel, Mark Steven Tice and Lewis should have been permitted to suppress a chart seized without a warrant from their vessel.

The convictions of Samsel, Mark Steven Tice and Lewis were reversed.

STATEMENT OF THE CASE

The investigation in the instant case was initiated on August 14, 1978. On that date, DEA Agent Michael Cunniff was informed by a Maine Special Investigations Trooper that he had observed a 1977 Dodge four-wheel drive pickup equipped with a cab and curtained windows traveling south on Route 95. The Dodge appeared to be paying excessive attention to other vehicles on the road. The pickup was registered to an "Earl Edwards" at the address of a Portland Hotel. Further investigations disclosed that "Earl Edwards" had never been registered there and had no Maine Driver's License.

On October 19, 1978, DEA agents visited Maine Coastal Warden Leigh MacKeen at his house on Dennison Point Road in Cutler, Maine. Warden MacKeen informed the DEA agents of his suspicions about a "Lou and Linda Walker," who resided at the "Hill Cottage" at Dennison Point in Cutler, Maine. The property includes 17 acres of shorefront along Bear Cove in Little Machias Bay. MacKeen had observed "Walker" driving the aforementioned Dodge pickup, as well as a 1977 Chevrolet Blazer. A DMV check disclosed that the Blazer was registered to an "Earl Ward" and that the aforementioned Dodge pickup had been re-registered, again to "Earl Edwards," but a different birth-date and address were listed.

MacKeen and the DEA agents under-took surveillance of the Hill Cottage.

Using the pretense of searching for a lost pet, the agents engaged "Lou Walker" in conversation and learned that he was a carpenter from Nebraska, acting as a caretaker for the "Hill Cottage".

In the ensuing investigation of the next few weeks, the DEA agents learned that the "Hill Cottage" property had been purchased a year earlier by a "Thomas Melrose" at an address in Boston. The investigation revealed that both the Dodge pickup and the Blazer had been purchased with cash and personal money orders by "Edwards" and "Ward", respectively. "Edwards" also purchased an outboard motor at a sporting goods store.

The agents continued surveillance of the vehicles and of the "Walkers". On November 14, 1978, Warden MacKeen requested

but was denied, permission from the "Walkers" to hunt on the "Hill Cottage" property.

On December 11, 1978, a local resident telephoned Warden MacKeen's wife to report that two strangers were walking around the neighborhood and looking into cars. Warden MacKeen had passed two unfamiliar people walking on the road that evening. He returned in his vehicle to look for them.

Warden MacKeen found the two men, petitioners Michael Tice and Robert Jackson, at approximately 9:15 p.m. In response to MacKeen's inquiries, Michael Tice and Robert Jackson stated that they were looking for a camp in the area of Little Machias Bay. Jackson explained that a person at the camp had the mate to a two-

way walkie-talking radio which he carried in his rain slicker. Warden MacKeen admonished them to leave the area. Michael Tice and Jackson indicated that they would spend the night with a local resident, Ted Gramlich, and proceeded down the road toward his house.

MacKeen later confronted petitioners Michael Tice and Jackson as they were entering the Gramlich driveway. Appellants stated that their vehicle had become disabled in Trescott, Maine. Warden MacKeen repeated his earlier admonition in even stronger language.

Upon returning to his home, Warden MacKeen was informed by his wife that a neighbor had telephoned to notify him about a vessel "hovering" without lights in Little Machias Bay off Dennison Point. The neighbor had also telephoned the Jonesport

Coast Guard Station to relay that he had observed an inflatable raft in the Bay and had heard unidentifiable splashes.

Warden MacKeen and a Warden Allen walked to the cove and observed a large black and white boat, later identified as the 135-foot tug Tusker, lying a half mile off the point with its lights out. The vessel's engines ran intermittently to maintain its position. Allen continued the surveillance of the vessel and MacKeen returned to his house to notify the Coast Guard and the State Police. Soon thereafter, state officers and DEA agents arrived at MacKeen's home.

At approximately 10:30 p.m. on December 12, a 41-foot Coast Guard Patrol boat was dispatched to the scene. Shortly thereafter, the 82-foot cutter, Point

Hannon, was also dispatched. The 41-foot Coast Guard Patrol boat (hereinafter referred to as the "41-footer") was ordered not to board the Tusker until the Point Hannon arrived.

The 41-footer surveilled the Tusker while situated a mile-and-a-half south of the subject vessel, but they could not determine if the engines were operating, and could discern no activity aboard the Tusker. It was a very calm night and the Tusker was well illuminated by the moon. The 41-footer relayed to the Jonesport Station that there was a possibility that it had been sighted by the Tusker.

Meanwhile, Officer Hawkins at the Jonesport Station received a phone call from a local resident, Bo Thott. Thott indicated that he observed an inflatable

raft approach the Tusker and heard unidentifiable splashes. Hawkins instructed the 41-footer to board the Tusker.

The 41-footer approached the Tusker with flashing blue lights and sirens, while ordering the Tusker to "Heave To;" and four armed Coast Guard Officers boarded the vessel.

Jerry Samsel, Mark Tice and Franklin Lewis were aboard the Tusker. Samsel the master of the vessel, informed them the Tusker had weathered a winter storm, an electrical fire and steering difficulties while en route from Norfolk to Nova Scotia. The boarding party's observations confirmed the operational difficulties.

A two-and-a-half to three hour search disclosed no controlled substances

or contraband of any type. Although no tangible evidence was obtained from this search, the identities of the crew, the ship's registration, passports, and all of the ship's various papers were copied by a Seaman Wood and the information was relayed to the Coast Guard Station. After the search, the Tusker was escorted by the Point Hannon to the Cutler Harbor and secured at a Navy Pier.

In the meantime, a Warden Fetterman joined Warden Allen at the Cove. Fetterman had previously observed a small boat heading toward the Tusker and then returning to Bear Cove. A ground search for the two occupants of the small boat was initiated btween 11:00 - 11:30 p.m. Initially, the agents tracked a single set of footprints which were ultimately

determined to have been made by a neighbor, Francis Randall. The agents returned to the shore to resume the search.

Warden MacKeen testified that they found a canvas bag in the snow which contained a paper with the notations "Mac" and "blue p/u". At 1:35 a.m. on December 13, Wardens MacKeen and Fetterman found appellants Roland Weber and Fred Strimpel in sleeping bags in the woods and arrested them for alleged "boating violations." A zodiac air pressure guage was found on Roland Weber. The aforementioned "Lou Walker" was later identified as appellant Roland Weber.

At 6:00 p.m. the following morning, DEA Agent Cunniff boarded the Tusker to arrest Lewis, Samsel and Mark Tice. Agent Cunniff had no search warrants or arrest

warrants. Cunniff was accompanied by Warden MacKeen, Trooper Vittum and two Coast Guardspersons, all of which were armed. Cunniff requested the crew to assemble and informed them that they were under arrest for conspiracy to violate federal narcotics laws. Cunniff also seized charts, money, credit cards and "other documents" from the vessel. Agent Cunniff was informed that petitioners Michael Tice and Jackson had been members of the crew. Cunniff continued the conversation while transporting the appellants to the Sheriff's Office.

Through a telephone canvass, DEA agents learned that Michael Tice and Jackson were located at the Holiday Inn in Bangor, Maine. The Officers were dispatched to apprehend them and observed Michael

Tice and Jackson checking out and leaving in a rented blue pickup truck with a third person, later identified as appellant McDougal. They were arrested after being questioned regarding their activities of the previous days.

McDougal, Jackson and Michael Tice were transported to the Federal Building in Bangor. Prior to returning the pickup to the rental agency, DEA Agent Drinan asked McDougal if there were any personal items he wanted to recover from the truck. Agent Drinan fetched an aluminum camera case and asked McDougal for an itemized receipt for its contents. Drinan noticed a bulge under the foam lining and removed a knife, two envelopes and a map. Thereafter, Drinan removed some tires and a yellow rain slicker from the truck bed. Agent Drinan unrolled the slicker and

seized a walkie-talkie radio.

Over the next several days, a total of 17 canisters containing hashish were recovered from Little Machias Bay. None of the canisters were recovered until after all of the appellants had been arrested.

On December 14, 1978, Agent Steadman executed a search warrant on the Tusker and recovered charts and other documents, but no controlled substances.

ARGUMENT

I

PETITIONERS JACKSON AND MICHAEL TICE SHOULD BE ACCORDED STANDING TO CONTEST THE SEIZURE OF THE CHARTS FROM THE "TUSKER".

Both petitioners submitted affidavits to the district court, that they had been crewmembers of the "Tusker." After the arrests of the remaining crewmembers, the agents were informed by Samsel that Jackson and Michael Tice had both been crewmembers and had taken a rubber boat ashore two days earlier. The government stipulated that petitioner Tice's brother, who remained onboard the Tusker, would have standing. Petitioners submit that they should stand in the same shoes as their fellow crewmembers. The mere fact that they happened to be apprehended on shore, rather than

aboard the "Tusker," should not deprive them of standing to contest the warrantless seizure of the chart from the wheelhouse.

It was not controverted that petitioners were crewmembers who resided upon the vessel. They had departed for shore with a rubber boat for unspecified purposes and had no permanent intention to abandon their residence aboard the vessel. The fact that this vessel included crews quarters and living areas serves to distinguish this vessel from an automobile, which has a lessened privacy expectation. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

While it appears reasonable that crewmembers have no legitimate expectation of privacy in the cargo area of the vessel, [United States v. Williams, 600 F.2d 18 (5th Cir. 1980)], the same cannot be said for the wheelhouse area of a vessel, since

it often serves as a common social area for a vessel. It cannot be stated that a crewmember would not have an expectation of privacy in the wheelhouse area for purposes of standing to assert Fourth Amendment violations. A distinction must be made between an ordinary pleasure craft, with no usual residents, and the proprietary considerations applicable to a vessel upon which individuals reside. United States v. Vicknair, 610 F.2d 372 (5th Cir. 1980).

The First Circuit opinion below relied upon United States v. Arra, 630 F.2d 836 (1st Cir. 1980), which refused to extend standing to crewmembers beyond their individual living quarters. The narrow rationale of the opinion fails to consider the practical living arrangements aboard a large vessel, such as the "Tusker", and its

common but nevertheless private social and living areas. An analogy can be made to a search of a suite of corporate officers whereby an individual is permitted to contest a search of the entire suite of offices, rather than be limited to contesting only a search of his individual office or desk. United States v. Lefkowitz, 618 F.2d 1313 (9th Cir. 1980), cert. denied 449 U.S. 24 (1980).

Petitioners respectfully submit that their temporary absence from the vessel must not deny them standing, which was conceded the other crewmembers, to contest the seizure of the charts from the wheelhouse. The First Circuit ruled the warrantless chart seizure was illegal and reversed the convictions of the crewmembers present at the time of the search.

Petitioners sumbit the same result must be accorded them since, but for their absence from the vessel for a limited period of time, they were also crewmembers with a reasonable expectation of privacy in the wheelhouse area of the vessel.

II

ALL ITEMS SEIZED FROM PETITIONER McDOUGAL'S BRIEFCASE SHOULD HAVE BEEN SUPPRESSED.

Subsequent to his arrest, McDougal was transported to the Federal Building in Bangor, Maine. DEA Agent Drinan inquired of McDougal whether he had any personal items in the rental truck which he wanted to recover prior to its return to the rental agency. McDougal stated he wanted an aluminum case in the front seat which contained his camera equipment. Drinan retrieved the case and asked McDougal

to itemize the camera equipment. McDougal removed and itemized several items, at which time Agent Drinan notice a bulge behind the case lining. He reached into the case and seized inter alia three (3) topographical maps of the Dennison Point area.

Agent Drinan specifically requested McDougal to itemize the camera equipment so that Drinan could note the serial numbers. McDougal's acquiesence to the request of Agent Drinan cannot be construed to amount to a consensual search of the entire case and its contents. While McDougal was complying with Drinan's specific request for camera equipment itemization, Drinan reached into the case and seized the charts from behind the lining.

Clearly, the camera case was in the possession of the police officials when it was taken from the rental vehicle. While in his possession, Agent Drinan could have obtained a search warrant to seize items from the case lining. The fact that it was a small case does not diminish its constitutionally protected status. United States v. Chadwick, 433 U.S. 1 (1977). Further, since the items were not in plain view, and Agent Drinan had no reason to suspect contraband, such plain view justification is lacking.

The facts indicate an expectation of privacy by McDougal in the closed camera case. He opened the case, as requested, to itemize the camera equipment. Upon viewing the bulge behind the lining, Agent Drinan commenced an exploratory search

without a warrant. Such exploratory searches are explicitly prohibited, since the agent's authority to possess the camera case was distinct from his right to examine its contents. United States v. Rabinowitz, 339 U.S. 56 (1957); Arkansas v. Sanders, 442 U.S. 753 (1979); Walter v. United States, 447 U.S. 649 (1980).

III

THE WALKIE-TALKIE SEIZED FROM JACKSON'S RAINSLICKER SHOULD HAVE BEEN SUPPRESSED.

After the incident involving petitioner McDougal's camera case, Agent Drinan returned to the rental truck and observed a yellow rainslicker rolled-up in the bed of the vehicle. He unrolled the slicker and seized a walkie-talkie. Petitioner Jackson submits this warrantless seizure of his personal property contained within

the rainslicker necessitates suppression.

The original opinion of the First Circuit suppressed this seizure. The majority was of the opinion that the decision in United States v. Robbins, ____ U.S. _____, 101 S.Ct. 2841 (1981) was controlling and to inquire into the subjective intent of petitioners' privacy expectations would be fruitless. However, upon rehearing, the First Circuit concluded that Robbins enlarged the concept of containers, within the intended Fourth Amendment context, and should not be applied retroactively. The Court appropriately noted that certiorari had been granted in United States v. Ross, 655 F.2d 1159, D.C. Cir. 1981, 50 L.W. 3265 (1981) and recognized that "whatever we now decide will have but short precedential value."

Petitioner submits that his expectation of privacy was apparent from the rolled-up and closed condition of the rainslicker, which contained his walkie-talkie. As the original First Circuit opinion recognized, there was no suggestion that the discovery of the walkie-talkie was inadvertent. (Appendix A-17). In that the container, flimsy as it was, was searched without a warrant, the walkie-talkie should have been suppressed.

Petitioner submits he should benefit from the principles re-affirmed in the Robbins decision and the rainslicker seizure must be suppressed.

IV

THE ARRESTS OF PETITIONERS STRIMPEL, McDOUGAL AND WEBER WERE PRETEXTUAL AND ALL RESULTING EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The facts indicate that petitioners were arrested for allegedly operating a boat, at night, without required running lights, in violation of 12 Me. Rev. Stat. Ann. § 2074. Maine statutes permit a misdemeanor arrest by a police officer for offenses committed in his presence. State v. Cowperthwaite, 354 A.2d 173, 176 (Me. 1976). Interestingly, the alleged offense involved was not committed in the presence of the arresting officers. Upon their arrival at the federal building, petitioners were charged with suspected violation of federal smuggling laws as were the three crew-members of the Tusker.

The arrests for violation of the smuggling laws preceeded the discovery of any contraband whatsoever. In fact, the contraband was not discovered until several days after the initial arrests of the petitioners. Petitioners submit that the arrests were merely for purposes of further investigation and therefore illegal. Duniway v. New York, 442 U.S. 228 (1979). Further, pretextual arrests renders all evidence, including the identity of petitioners, subject to suppression. Abel v. United States, 362 U.S. 217 (1960).

Petitioner McDougal was arrested in a dragnet effort by Maine officials while searching for Michael Tice and Jackson. He was arrested for suspected smuggling when he gave answers the officers deemed untruthful. Petitioners' warrantless

arrest was without probable cause and all evidence and statements obtained as a result, including the seizure of his walkie-talkie, should have been suppressed.

CONCLUSION

For all the reasons stated herein, petitioners Weber, Strimpel, McDougal, Tice and Jackson respectfully request this Court to grant the Writ prayed for and review the decision below.

DATED: 3/3/1982

PHILIP A. DeMASSA
Attorney for Petitioners

Exhibit

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 80-1533
through
80-1540

Filed:
September 30, 1981

UNITED STATES OF AMERICA,
Appellee,

v.

ROLAND WESLEY WEBER, et al.,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MAINE

[Hon. Edward T. Gignoux, U.S. District Judge]

Before Coffin, Chief Judge
Aldrich and Bownes, Circuit Judges.

Philip A. DeMassa, with whom Patricia S. O'Mara was on brief, for appellants.

Margaret D. McGaughey, Assistant United States Attorney, with whom Thomas E. Delahanty, II, United States Attorney, and James W. Brannigan, Jr., Assistant United

EXHIBIT "A"

States Attorney, were on brief, for appellee.

September 30, 1981

Aldrich, Senior Circuit Judge.

Defendants Weber, Strimpel, Samsel, Mark Tice, Lewis, McDougal, Michael Tice, and Jackson were indicted, inter alia, for conspiracy to import, and to possess with intent to distribute, hashish in violation of 21 U.S.C. §§846 and 963. After commencement of a jury trial, defendants and government counsel entered into an agreement, approved by the court, to the following effect. Defendants would waive trial by jury and would submit to trial by the court upon certain agreed facts and the testimony and exhibits which defendants had unsuccessfully moved to suppress before trial, and would stipulate that the

evidence was sufficient to charge every defendant, but reserving the right of appeal from the court's refusal to suppress. In return, the government agreed to dismiss the substantive counts, and to recommend certain sentences on the conspiracy count. Thereafter defendants were found guilty, and they appeal. [1] No other errors are asserted. Because in two respects the motions to suppress should have been granted, we reverse, in part, as to four defendants, but otherwise affirm.

In connection with its action on the motions the court issued an extensive memorandum opinion, together with its legal conclusions. Since this memorandum was not

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[1] Seemingly the court imposed less than the agreed to sentences, most likely because of Bifulco v. United States, 1980, 447 U.S. 381, but none of this is clear on the record.

published, we will (a) summarize somewhat, but quote extensively therefrom; [2] (b) not certain "facts" asserted by defendants, and their incorrectness; (c) summarize and supplement the district court's rulings, and (d) deal with the two items, a walkie-talkie and a chart, that, as to some defendants, should have been suppressed.

THE FACTS

The operative events occurred on and near Little Machias Bay, Maine, on December 12 and 13, 1978. [3] The bay, as shown on the Loran-lined edition to U.S.C.

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[2] All quotes in this opinoin, unless obviously otherwise, are from the court's memorandum.

[3] Defendants' objections to a warrant-supported search on December 14 are too frivolous to require discussion.

& G.S. chart No. 1201 in evidence [4] is in reality a cove, 5/8 mile wide. It faces south, viz., the ocean, is open and exposed, and is without wharves or other facilities. Lying centrally off the bay, in deep water, are two small islets, known as Black Ledges. Two and a half miles to the east is the town of Cutler, with an excellent anchorage, and twenty miles to the east is the Canadian border. Two miles to the west, but cut off from it by islands and a point of land, is Machias Bay and a Naval Pier and twenty

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[4] The ship's copy of this chart, Exhibit 8, containing certain private markings, was unlawfully seized, post. However, the chart itself is a standard government publication in such common use that under principles of judicial notice we will refer to it, minus the markings. It would be in no way significant, or improper, for the vessel to have an unmarked copy of this chart aboard, and there is no prejudice in this limited use.

miles to the west is the U.S. Coast Guard station at Jonesport.

The easterly side of Little Machias Bay terminates at Dennison Point. The Point is sparsely housed, partly cleard and partly wooded. At the end of the road, and fronting on Bear Cove, a small inlet from the bay, are a large house and out-buildings known as Hill Cottage. Coastal Warden MacKeen resided 200 yards inland from the Cottage. Other persons resided further back.

The cast of characters begins, however, with Special Agent Cunniff, of the U. S. Drug Enforcement Administration, and Trooper Watkins, of the Maine Division of Special Investigations who worked in concert with him. During the late summer and fall these officers became interested in a Dodge Power Wagon 4 whell drive pickup truck with

a covered camper cap, and a Chevrolet K-5 Blazer, both Maine registered, but with undiscoverable owners. The handwriting on both sets of purchase documents appeared similar, and both vehicles were seen at times on the Hill Cottage property. The Cottage had been purchased the year before by one Melrose, whose only mailing address was a Boston answering service, and who had never been seen. The property was currently occupied by a Lou and Linda Walker, the former proving ultimately to be defendant Weber. Weber told neighbors that he was a Nebraska carpenter who had answered an advertisement to occupy as a caretaker, and was leaving shortly.

The above facts, together with many others properly found by the court, showed a classic example, shoreside, of a drug

smuggling set-up, and the court so finding cannot be faulted. On December 12, 1978 the ocean activity commenced. The night was clear and calm, with a bright moon. At about 9 P.M. another coastal warden, Allen, called MacKeen's attention to

> "a large black and white boat, later identified as the 135-foot seagoing tug Tusker of Panamanian registry, with its lights out, lying about a half mile off the point on the inland side of Black Ledge.... The boat's engines ran intermittently to maintain its position behind the ledge. While Allen continued to watch the boat, MacKeen returned to his house and notified the Coast Guard and the Maine State Police.
>
> "[A]t 9:35 p.m. the Coast Guard station at Jonesport dispatched a

41-foot patrol boat under the command of Petty Officer Paul E. Laurent. Shortly thereafter, the 82-foot cutter Point Hannon was underway. By 10:33 p.m. the patrol boat had arrived in the area. Laurent had been instructed to remain out of sight behind an island, but by mistake he overshot the island and fell dead in the water at the mouth of Little Machias Bay. In that position the patrol boat was silhoutted against the sky and Laurent suspected that he had been seen in the bright moonlight. Laurent could see the Tusker without its lights on but could discern no details."

Shortly before this another coastal warden, Fetterman "had observed a small boat, later determined to be a Zodiac inflatable rubber boat with a 15-

horsepower outboard motor, operating without lights, with two occupants, come out of Little Machias Bay around Dennison Point and proceed to the Tusker. About five minutes later Fetterman saw the Zodiac, still without lights and with two occupants, depart the Tusker and head directly into Bear Cove. As the Zodiac was approaching the cove, the Coast Guard patrol boat turned on its lights and started toward the Tusker. Fetterman, and Cunniff and MacKeen, who had arrived at the shore, saw the Zodiac change its course and head toward the wooded area to the east of Bear Cove. After proceeding about 100 yards, it stopped briefly and something was

thrown overboard.[6] The Zodiac then moved into shore between two ledges, where the officers lost sight of it. They heard noises in the bushes which they took to be the occupants of the boat working their way through the underbrush. A few minutes later the Zodiac floated out from between the two ledges.[7]

"Fetterman, Cunniff and MacKeen went to the spot where the Zodiac had landed. There they found two sets of tracks

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"[6] Divers later recovered a box containing radio equipment from the approximate location.

"[7] Later that night, a small boat from the Point Hannon found the Zodiac almost swamped floating off the coast with the plugs along one side pulled and the air compartments along that side deflated.

beginning at the snow line marking the reach of high tide. Alongside the tracks they found a canvas bag. Cunniff searched the bag, which contained, along with food and camping supplies, two sheets of yellow legal paper listing supplies and equipment and including the notations 'Mac' and 'blue p/u'. Cunniff returned to MacKeen's house. MacKeen and Fetterman set off to follow the tracks, at a point where the underbrush impeded further progress, they found two men lying in sleeping bags. MacKeen and Fetterman arrested them for operating a boat without lights at night. See 12 Me. Rev. Stat. Ann. §2074. The two men identified themselves as defendants Weber and Strimpel. MacKeen asked Weber if he

was not 'Lou Walker', but Weber insisted his name was Weber. Two two men were searched, and a Zodiac air pressure gauge was found on Weber."

Strimpel and Weber were taken to Machias and formally arrested for violation of the federal narcotics law.

"In the meantime, the boarding party from the Coast Guard patrol boat, led by Petty Officer Laurent, had boarded the Tusker at about 11:00 p.m. As they approached the vessel, the party had noted that she was flying a foreign flag. Only three persons were found aboard: defendant Samsel, who identified himself as the master, and defendants Mark Tice and Lewis. Samsel stated that they had been en route from Norfolk, Virginia, to Nova Scotia and had pulled

into Little Machias Bay because of a bad winter storm and mechanical difficulties with the steering and electrical systems. He produced the vessel's Panamanian registration, which named 'Ocean Survey and Study, Ltd.' as the owner and gave a California telephone number.[9] The boarding party copied the information they wanted from the registration and the crew's seamen's papers. Laurent and another member of the boarding party, accompanied by Samsel, then searched the vessel for marijuana bales. None were found.... No arrests were made, no [physical] evidence was taken, and the vessel was not seized. Samsel,

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"[9] A check by the Coast Guard later that night disclosed that the California number was that of an answering service.

however, stated that the Tusker needed to get into a port for repairs, and at his request the Point Hannon, which had arrived at about 11:15 p.m., escorted the Tusker into the Cutler Naval Station, where both vessels tied up at the Navy pier.

"Early the next morning, at about 6:00 a.m., Cunniff, accompanied by Vittum, MacKeen and two coastguardsmen, went to the Cutler Naval Station. Cunniff boarded the Tusker and opened the hatch leading to the main cabin. Without entering, he asked if anyone was there. He was answered by Samsel, who said, 'Come on in' and led the officers to the mess hall. Cunniff identified himself and those with him and asked Samsel to get the other two

crewmembers, which he did. When all three - Samsel, Mark Tice and Lewis - were assembled in the mess area, Cunniff placed them under arrest for conspiracy to violate the federal narcotics laws, and he told them that the vessel was seized under 21 U.S.C. § 881. He then read them their rights from his Miranda card, omitting, however, the final question of whether they wished to waive their rights. Each defendant individually acknowledged that he understood each of his rights. After informing defendants of their rights, Cunniff did not 'interrogate' or 'question' them, but told them to go to their quarters and collect their personal belongings. Each defendant then went to his cabin, accompanied

by an officer, and collected his belongings. While still aboard the boat, Samsel stated to Cunniff that the Tusker had come from Singapore; that her last port of call had been Norfolk;and that they had had mechanical difficulties and he was concerned about traveling further without repairs. Lewis said the Tusker had had water and heating problems. When Cunniff asked Lewis what he did, Lewis stated that he was the boat's bursar, that he was a retired Navy jet pilot, and that he had not thrown anything overboard. Mark Tice stated that he was the engineer of the boat and that he did not know where they had been, where they were going, or why they were in Maine, because he spent so much time below deck. He also stated

that Samsel would obtain instructions by calling the managing company, Ocean Research. The three defendants were then driven to the Washington County Sheriff's office in Vittum's car. On the drive to Machias, Samsel stated that Michael Tice and Jackson had been on the boat and had left two days earlier in a Zodiac with a 15-horsepower engine. 10/ "

Footnote 10 reads as follows.

"10. Before leaving the Tusker, Cunniff seized 6-10 charts and a clipboard with paper, which he found on a table in the wheelhouse. He also seized money and some personal papers from the crewmembers and some personal item from the living quarters."

This seizure included the 1201 chart, Exhibit 8.

Later Michael Tice and Jackson were stopped in a blue pickup driven by McDougal and arrested, and after some conversation McDougal was also arrested.[5]

> "The three defendants and the truck were taken to the Federal Building in Bangor, where the men were taken to the jail facilities and the truck was

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[5] In this connection the court found, "At the time he began his questioning, Drinan did not intend to arrest McDougal. He had been informed of Samsel's statment that Jackson and Tice had been on the Tusker, but, although suspicious, he realized that he had no specific information linking McDougal to the vessel. He was, however, aware of the notations 'Mac' and 'blue p/u' (taken by Drinan to mean 'pick-up'), on the list found in the canvas bag on the shore."

parked and locked in the garage. The men were only questioned to the extent necessary for booking. The truck was returned to the rental agency. Prior to doing so, Drinan removed the tires and rainslicker from the truck. In the Marshal's office he found a walkie-talkie radio rolled up in the slicker.[12] During the booking of McDougal, Drinan asked if there was anything that McDougal wanted to recover from the truck before it was returned to the agency. McDougal said he wanted the aluminum case in the front seat, which was his and which contained expensive photographic equipment. Drinan retrieved the case. He then asked McDougal to give him a

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"12 It has been stipulated that Jackson was the owner of the yellow rainslicker and radio.

receipt itemizing the camera equipment. McDougal opened the case and Drinan removed each item, listing each on a receipt, which McDougal signed. While doing this, Drinan notice a bulge in the foam lining of the case which was not glued in place. From behind the lining he removed a kitchen knife, a manila envelope, and three topographical maps of the Dennison Point area that had been folded to fit together. He opened the manila envelope, which was not sealed, and found two sealed envelopes addressed to a Michael Panier, San Diego, California. [13] The items found behind the foam lining were seized by Drinan.

"13 The two sealed envelopes were later opened pursuant to a search warrant secured by Steadman. Some file was also seized and developed pursuant to a warrant.

"Over the next three days, 16 metal canisters, each measuring approximately 10" by 10" by 20" containing hashish, and weighing between 50 to 75 pounds each, were found in various shore and sea areas in the vicinity of Little Machias Bay and Cutler Harbor. Two more canisters were found in March 1979 on Deer Island, about a mile east of Bear Cove in Little Machias Bay. The first eight canisters were found by a fisherman on the morning of December 13, but the officers did not learn of the discovery until after all the defendants had been arrested. The canisters were seized and opened by the government without warrants.

"On December 14 Steadman executed a search warrant issued by a United

States Magistrate for the Tusker. No hashish or other contraband was found, but Steadman seized navigational equipment, charts and other papers."

The Fantasies (Quotations are from defendants' brief.)

I. The Tusker was a "damaged...vessel [that] sought refuge in a small town's harbor," elsewhere referred to as "Little Machias Harbor."

In fact, there was no town. Little Machias Bay was neither a harbor nor an appropriate place of refuge, particularly in light of the proximity of Cutler Harbor, unless avessel had lost all possiblity of movement. This was conspicuously not the case. The reason the Tusker appeared not to have cabin lights was because her ports

had been shielded with foil.

II. "Mechanical difficulties and inclement weather necessitate the stop in Little Machias Bay."

If there had been inclement weather, it was over. It was undisputed that it was a "very calm night."

III. The actions of the Zodiac's crew were "innocuous and consistent with the behavior of a concerned neighbor motoring out to offer assistance to a distressed vessel." They "motored out to inquire...since there vessel appeared to be in distress."

Viewed from the shore the only conceivable sign of distress was that the vessel was without lights - surely not enough to evoke sizable concern from local

residents, even the most generous minded. Moreoever, the Zodiac was not known to belong to any resident, the bay being without boats, wharves, or other facilities.

IV. The Tusker was a "marginally operable vessel" and it could not be inferred that she "had crossed the border... since the nearest border is at least 100 miles north of Little Machias Bay, and not within [her] range."

The Tusker was 135' ocean going tug. At the original boarding Samsel, as master, stated they were en route from Norfolk, Virgina to Novia Scotia. The Canadian border was 20 miles, not 100 miles, distant. Moreover, as counsel must know, since they cite United States v. Zurosky, post, the relevant border is between territorial and international waters. In this instance

this was some 3 1/2 miles.

V. "It was not controverted that there were other vessels present that evening from which it is just as likely that the contraband originated...."

It was not "controverted" because there was no evidence of any other vessels, likely sources or otherwise.

That counsel, not inadvertently during oral argument, but deliberately, in a brief, should make such unsupported statements of purported fact raises serious disciplinary questions in our minds. At the least, it means that we must seriously question defendants' brief from cover to cover.

Summary

In sum, there was no apparent reason for the Tusker to be where she was, or for the Zodiac tc put out to her, except as a

drug or other smuggling operation; drugs being the most likely. Even on the most innocent view, the Zodiac was operating illegally without lights, as it cannot be said that, coming from the shore, she fell within the exempt classifications of a foreign vessel, or a lifeboat. 46 U.S.C. § 1453(c)(1) and (4). With this introduction we approach the issues raised in defendants' motions to suppress.

Standing

Although the court first dealt with questions of standing of particular defendants with respect to particular matters, we will leave this until later, and merely list at the outset certain items as to which no one had a sufficient personal interest to object. See generally Rakas v. Illinois, 1978, 439 U.S. 128, United

States v. Salvucci, 1980, 448 U.S. 83. The court could properly find that defendants abondoned the Zodiac, the canvas bag found near the spot where the Zodiac had landed, and the box of radio equipment found in the adjacent waters. Cf. United States v. Mustone, 1 Cir., 1972, 469 F.2d 970, 972. While the court assumed standing as to some defendants with respect to the floating canisters containing hashish discovered subsequent to all of the arrests, we see no basis for that assumption, it being apparent that the canisters, if coming from the Tusker, were jettisoned upon the lawful approach of the Coast Guard, as distinguished from being put overboard as a convenience with off-loading. But even if some defendants could claim a possessory interest, that would no longer entitle

them to standing in the absence of a legitimate expectation of privacy. United States v. Salvucci, ante.

The December 12 boarding of the Tusker.

The court found the initial boarding of the Tusker a legitimate border search. The correctness of this does not require discussion, as plainly the Coast Guard could reasonably conclude she had come from international waters. 19 U.S.C. § 1581(a); Almeida-Sanchez v. United States, 1973, 413 U.S. 266, 272-73; United States v. Zurosky, 1 Cir.,1979, 614 F.2d 779, 787-88, cert. denied, 446. U.S. 967. See generally Note, High on the Seas: Drug Smuggling, The Fourth Amendment, and Warrantless Searches At Sea, 93 Harv. L.Rev. 725, 731-38 (1980). Since probable cause existed, we need not

pursue the correctness of the Fifth Circuit's analysis of United States v. Ramsey, 1977, 431 U.S. 606, in United States v. Williams, 5 Cir., 1980, 617 F.2d 1063 (en banc).

The arrest of Weber and Strimpel.

By following footprints through the snow from where the Zodiac had landed, MacKeen and Fetterman came upon Weber and Strimpel lying in the woods in sleeping bags. They arrested them for a boating violation, viz., running without lights. Defendants contend this was excessive response to a misdemeanor, and merely a pretext. We need not pursue this matter; the officers had objective grounds for treating these defendants differently from the average offender of the boating laws. United States v. McCambridge, 1 Cir., 1977, 551

F.2d 865, 870. Their connection with the Tusker and her probable intent was manifest, and because they had left and were seeking to escape, it was proper to take them into custody. United States v. Miller, 1 Cir. 1978, 589 F.2d 1117, 1128, cert. denied, 440 U.S. 958.

The December 13, 6:00 A.M. entry on the Tusker

No contraband had been found on the Tusker December 12. However, as previously stated, at the time of the Coast Guard's approaching, parties on shore had heard a series of splashes which could well have been hasty disposition of objects. At 6:00 the next morning, while she was tied up to the Naval pier, Cunniff and several others boarded the vessel and arrested Samsel, Mark Tice, and Lewis. Defendants complain

that, procedurally, the agents did not sufficiently knock, or identify themselves before being invited in. On the facts found by the court, ante, [6] to which we we add the fact that this was quite evidently a Naval pier not open to the public, the court was warranted in finding no violation and sufficient consent. United States v. Miller, ante; United States v.

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[6] And, in addition, the court said "After boarding the Tusker, Cunniff opened the hatch to the entryway leading to the main cabin, put his head inside, and inquired, 'Anyone there?'. Samsel who appeared to be awake, answered and invited Cunniff and his party in. As the government points out, there is no doorbell on a ship's hatch and Cunniff might reasonably assume that knocking on a steel bulkhead would be a fruitless act. Opening the hatch, without entry, and calling into the cabin was a reasonable method of attracting the attention of those inside in order to give them notice. No violation of Section 3109, even if applicable, has been shown."

Bradley, 1 Cir., 1972, 455 F.2d 1181, 1185, aff'd, 410 U.S. 605; Robbins v. MacKenzie, 1 Cir. 1966, 364 F.2d 45, cert. denied, 385 U.S. 913.

The December 13 6:00 A.M. search of the Tusker

The entry resulting in the arrest of the defendants was justified, but the government has shown only consent to enter. Consent to enter is not consent to search, particularly not to search the entire vessel, notably that portion far removed from where defendants were, where the chart, Exhibit 8, was found. Consent to enter the mess area did not signify consent to search the wheelhouse, Cf. Walter v. United States, 1980, 447 U.S. 649, 656-57 (dicta) (consent to search a garage does not imply consent to search

a garage does not imply consent to search an adjoining house), Commonwealth v. Shaw, 1978, 33 Pa. Common. 468, 383 A.2d 496 (consent merely to enter does not authorize going to second floor). The government's burden of showing so broad a consent was not met. Cf. Robbins v. MacKenzie, ante.

Without consent, the warrantless search and seizure was unlawful unless it was justified by a specific exception to the warrant requirement. E.g., Coolidge v. New Hampshire, 1971, 403 U.S. 443, 454-55; United States v. Miller, ante. Whether the exceptions are still "jealously drawn," United States v. Jones, 1958, 357 U.S. 493, 499, may be debated, but they have not swallowed the rule, and we find none applicable here. The search was not incident to the arrests, as the

wheelhouse was by no means within the control or reachable area of the defendants, Chimel v. California, 1969, 395 U.S. 752; and a vessel on which persons are living, tied up at a Naval pier, and effectively guarded, is not comparable to an automobile on the highway. Cf. Chambers v. Maroney, 1970, 399 U. S. 42. It does not appear that the chart was truly in plain view, Coolidge v. New Hampshire, ante, at 467-68, cut in any event the officers were not legitimately in the wheelhouse, where they went, independently, after defendants had collected their belongings from the crew's quarters. Taking charts was manifestly a search for evidence, and not to be justified as the inventory search permitted in connection with seizure of the vessel under 21 U.S.C. § 881. United States v.

Pappas, 1 Cir., 1979, 613 F.2d 324, 331. Nor was the chart subject to destruction, Chimel v. California, ante, as the ship was being vacated, and would be watched.

The government having stipulated that Samsel, Mark Tice, and Lewis have "standing" to object to the search, we will address the issue no further, but hold that the rights of all three crew members were violated, although we might have reached a different conclusion as to Mark Tice, who denied any connection with navigation, and Lewis, who also may have had none. Of course the warrantless search did not violate the rights of the three defendants who were at no time crew members, nor those of Michael Tice and Jackson, who had left the ship and had no legitimate privacy interest in the area searched.

The arrest of Jackson and Michael Tice

Having learned, from the Tusker's crew list, of Jackson and Michael Tice, government agents arrested them in a blue pickup (in turn, learned of from the canvas bag). To the extent that this knowledge, plainly sufficient to constitute probable cause, may have come from violating the rights of persons aboard the Tusker, it did not violate theirs, and they have no standing to complain. United States ex rel. Wright v. Cuyler, 3 Cir.,1977, 563 F.2d 627, 632; United States ex real. Cardaio v. Casscles, 2 Cir. 1971, 446 F.2d 632; see Alderman v. United States, 1965, 394 U.S. 165, 171-76.

The arrest, etc. of McDougal

Although the court made extensive findings about McDougal, who was driving the blue pickup when the agents stopped

it to arrest Jackson and Michael Tice, the only complaints made on his behalf in defendants' original brief, outside of the general and utterly frivolous one that there was no right to take any action with respect to any defendant until the discovery of the canisters, were two: that he was arrested without probable cause, and that his camera case was excessively searched.

Taking the latter first, the search of McDougal's camera case to inventory its contents was consented to. The agent was not required to close his eyes to a good faith discovery of something behind the lining. United States v. Chadwick, 1 Cir., 1976, 532 F.2d 773, (dicta), aff'd on other gr'ds, 433 U.S. 1. Cf. United States v. Jeffers, 7 Cir. 1975, 524 F.2d

253, 255-56. We again refuse to hold "that expressions of consent relieve the officer of the need of obtaining a warrant only when the speaker is not aware that the search will disclose damaging evidence." Leavitt v. Howard, 1 Cir., 1972, 462 F.2d 992, 998, cert. denied, 409 U.S. 885.

As to the arrest, it is black letter law that an improper arrest does not vitiate a conviction, See, e.g., Menard v. Mitchell, D.C. Cir. 1970, 430 F.2d 486, 491 n.26. Further, the court's finding of probable cause was justified. In addition to his being with Jackson and Tice, the officers had the canvas bag reference to "blue p/u" and "Mac," both of which could well point to McDougal. In the truck were eight tires, four oversize, which the officers testified to being suspicious. The total would seem

sufficient quite apart from McDougal's statement of having picked up Jackson and Tice as hitchhikers, which the officers had good cause to believe false.

In defendants' reply brief it was sought to argue that McDougal's pre-arrest statements should have been suppressed because he was not given Miranda warnings. This was too late, except for clear error. F.R.Cr.P. 28(a). We do not, however, regard it as even error. To ask a driver's connection with his passengers was not merely "routine," but understandable and straightforward. See United States v. Pratt, 1 Cir., 1981, 645 F.2d 89, 90-91. No Miranda warnings were called for.

The Search of Jackson's rainslicker.

An hour after the arrest of the three occupants, the officers removed the

contents of the rented blue pickup before returning it to its owner. These included, from the back, Jackson's rolled-up rain-slicker. This they unrolled, finding a walkie-talkie. Unlike the unlawful early morning search of the Tusker even while a warrant to search it lawfully was being sought, with no cause for urgency, and the mishandling was being sought, with no cause for urgency, and the mishandling that exposed the patrol boat, permitting the jettisoning of the canisters, this action was understandable. Before the Court's all-embracing definition of containers and its rejection in the plurality opinion in Robbins v. California, (7/1/81) U.S. , 49 U.S.L.W. 4906, of our view of the importance of inquiring into expectations of privacy, e.g., United States v. Goshorn,

1 Cir., 1980, 628 F.2d 697, the officers might reasonably have thought their unrolling the slicker permissible without a warrant. Now, however, we feel obliged to hold it was not.

In Robbins the plurality opinion, [7] (all quotations are from 49 U.S.L.W. 4907) criticized various lower court cases "that have drawn a distinction between pieces of study luggage, like suitcases, and flimsier containers, like cardboard boxes." It went on to say, "What one person may put into a suitcase, another may put into a paper bag." The test of "container" was simply whether it was "closed [and]

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[7] Except for restrictions advanced in Justice Powell's concurrence-in-the-judgment opinion, the other justices mainly appeared to wish to extend the "automobile exception," rather than to disagree with general definitions of containers.

opaque." [8]

This definition, particularly the opaqueness, met the expectation-of-privacy requirement. If one could see through, or, alternatively, know the contents from a tell-tale shape, there could be no such expectation; otherwise, the objective test

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[8] In New York v. Belton, (7/1/81) U.S. , 49 U.S.L.W. 4915, 4916, the Court stated in footnote 4,

> "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk."

Unlike our dissenting brother, we read this not as a special enlargement of the general meaning of container, but as an emphasis that closed as well as open ones may be inspected without a warrant in a very specific area of an automobile.

was met by the fact that the container was "closed".

There was no suggestion that the officers could tell what was inside the rainslicker before unrolling, and the presumption would be to the contrary in the absence of such. Equally, there was no suggestion that the discovery was inadvertent. Contrary to our dissenting brother's posit, we do not envisage as a proscribed container a mere fold that could be expected to lead to a revelation in the normal course of handling. If "normal course of handling" does not create a totally bright line, it seems clearly sharper than a rule where the police, and ultimately the court, will reach factual conclusions as to the owner's intent. It is true that in Robbins the plastic bags

were fastened, and the slicker was not. However, we think it would be making fine, and harmful, distinctions to inquire into the subjective purpose of the extent of the closure. Arguably, a string around a rolled-up slicker could be intended to increase the physicial protection, not the privacy. The Robbins "bright line" definition and purpose, however, would be blurred by introducing such questions of subjective intent. We hold that if what is within, or enclosed, in another object cannot be objectively known, or at least reasonably believed to be known, by external inspection, without opening or undoing that object, a warrant is needed to discover it, in the true sense of the word, unless the case falls within some recognized exception. There was none here. A warrant should have been sought, and

the walkie-talkie was not admissible against Jackson.

The effect of the illegal seizures.

Had there been a normal trial, the defendants' central defense would have been that the Tusker's presence at Little Machias Bay was inadvertent, due to electrical, etc. failure. As already indicated, the evidence seems overwhelmingly to the contrary. However, perhaps the most individually damning evidence was Exhibit 8, the copy of chart 1201 found in the wheelhouse. On it the mouth of Little Machias Bay was designated with a red spot, with a course leading to it. Had this appeal followed a trial in the ordinary manner and had this chart been improperly admitted, the other evidence was so strong that even such a clincher might possibly have been found

merely cumulative and noprejudicial within the rule of Chapman v. California, 1967, 386 U.S. 18, 22. Rather clearly this would seem so as to Jackson's walkie-talkie. However, this is not what occurred. Defendants' stipulations and waivers were made on the assumption and condition not merely that their right of appeal was preserved, [9] but that the evidence was

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[9] The propriety of this general procedure, functionally equivalent to a conditional guilty plea, has never received our express approval. See United States v. Warwar, 1 Cir., 1973, 478 F.2d 1183, 1185 n.1. Other circuits are in conflict, see United States v. DePoli, 2 Cir., 1980, 628 F.2d 779, 791 n. 1; Note, Conditional Guilty Pleas, 93 Harv. L.Rev. 564 (1980), although much of the controversy revolves over allowing conditional pleas, not here involved. Compare United States v. Mendozo, 5 Cir., 1974, 491 F.2d 534, with United States v. Sepe, 5 Cir., 1973, 486 F.2d 1044. While the present procedure may result in piecemeal proceedings, see post, the normal saving in judicial time seems worth it, on the assumption that the district court has given the matter more than pro forma approval. See Note, ante, at 572-76.

properly admissible against them. In fairness this should mean all the evidence. The Seventh Circuit and two important state courts, in well-considered opinions, have held that a court has no right to decide for a defendant that his decision (in those instances, to plead guilty) would have been the same had the evidence the court considers harmless not been present. Jones v. Wisconsin. 7 Cir., 1977, 562 F.2d 440, 445-46; People v. Grant, 1978, 45 N.Y. 2d 366, 378-80, 380 N.E.2d 257, 408 N.Y.S. 2d 429; People v. Hill, 1974, 12 Cal.3d 731, 528 P.2d 1, 29-30. See also State v. Monahan, 1977, 76 Wis.2d 387, 251 N.W.2d 421, 426 (decided without discussion). [10]

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[10] A further court has rejected the conditional plea procedure partly for the reason that it can lead to reversal because of harmless error. United States v. Cox, 6 Cir., 1972, 464 F.2d 937, 945.

We agree. It follows that Jackson is entitled to vacate his stipulation and have a new trial without evidence of the walkie-talkie, and Samsel, Mark Tice and Lewis, a new trial without use of the chart. If they elect to do so, the government's stipulations, by their terms, will be equally vacated. The court's actions on the motions to suppress are otherwise affirmed, and the convictions of Weber, Strimpel, McDougal and Michael Tice are affirmed, as their rights were not invaded. Rakas v. Illinois, ante.

COFFIN, Chief Judge (dissenting in part). While agreeing with all other parts of the court's opinion, I deem it both unnecessary and inappropriate on this record to conclude that the Fourth Amendment required exclusion of the walkie-talkie found in Jackson's rolled up rain-

slicker. I would instead remand to the district court the issue of whether Jackson had manifested a reasonable expectation of privacy in the rainslicker.

The standards announced by the Supreme Court in Robbins v. California, 49 U.S.L.W. 4906 (July 1, 1981), govern this case. The Court held that a warrantless search of a carefully wrapped and sealed package violated the Fourth Amendment. Four Justices argued that any "closed, opague container" merits Fourth Amendment protection. Id. at 4908 (opinion of Stewart, J., joined by Brennan, Marshall & White, JJ). It was this combination of characteristics that "manifested an expectation that the contents would remain free from public examination." Id. at 4907 (quoting United States v. Chadwick, 433 U.S. 1, 11 (1977)).

Justice Powell concurred in the judgment "because the manner in which the package at issue was carefully wrapped and sealed evidenced petitioner's expectation of privacy in its contents." Id. at 4908 (Powell, Jr., concurring in the judgment).

I construe Robbins to mandate two distinct lines of Fourth Amendment analysis. First, if an object is a "closed, opaque container" it may not be searched without a warrant, absent an exception to the warrant requirement. Second, even if an object does not qualify as a "closed, opaque container", a warrant will be required to search if someone has manifested a reasonable expectation of privacy in the object. This dual test has the advantage of creating a bright line to guide police officers while preserving the Fourth Amendment's

traditional emphasis on protecting an individual's expectation of privacy.

This court's ruling today, in my view, misconstrues the holding in Robbins. While the court agrees that an object must be "closed [and] opaque" to satisfy the plurality's formulation, it adopts an overly broad definition of "container". The Court interprets Robbins to mean that "[t]he test of 'container' was simply whether it was 'closed [and] opaque'". Thus whenever something is "within or enclosed in" an object that must be "open [ed]" or Undo[ne]" to reveal the identity of its contents, that object is a container for Fourth Amendment purposes. The court therefore holds that since the rainslicker had to be unrolled to reveal the walkie-talkie, a warrant was required to conduct the search.

The court's holding relies on the Supreme Court's "all-embracing definition of containers" in New York v. Belton, 49 U.S.L.W. 4915, 4916 n. 4 (July 1, 1981), as "any object capable of holding another object". But in my view it is inappropriate to extend this definition beyond the subject matter of that case. The Court in Belton was dealing with a search contemporaneous with a lawful custodial arrest of an occupant of an automobile and held that such a broad definition was justified since any article, including a container, is within reach of the arrestee and falls under the rule of Chimel v. California, 395 U.S. 752 (1969). Belton, supra, at 4916. This rationale clearly does not apply to the facts of the case before us. Moreoever, I attribute some limiting significance to the

use of the word "here" in Belton's definitional footnote: "'Container, here denotes any object capable of holding another object." Id. at 4916 n. 4 (emphasis added). I see similar significance in the sentence closing that footnote: "Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." Id. One can read this sentence not merely to emphasize that warrantless searches contemporaneous with a lawful custodial arrest are only permissible in the passenger compartment- a thought communicated elsewhere several times-but also to suggest that the definition of "container" is limited to this context as well.

Robbins, on the other hand, resembles the case at bar in that it did not involve

a search contemporaneous with arrest, and thus seems the more relevant precedent. I am impressed by the fact that every one of the many references to "container" in all the opinions in Robbins describes objects fabricated and particularly suitable for the sole purpose of containing other things. Justice Powell, in his concurring opinion, seems to corroborate this understanding when he writes: "In accordance with the plurality's usage I use the term 'container' to include any and all packages, bags, boxes, tins, bottles and the like." Robbins, supra, at 4908 n.1 (Powell, J., concurring in the judgment).

I view Belton as designed to give law enforcement officers an open sesame to search all objects within an automobile's passenger compartment in conncection with a

contemporaneous arrest-including anything that could hold anything else. Robbins, in contrast, restricts officers in other kinds of searches. To incorporate the same all-embracing definition of "container" in a Robbins context dramatically increases the restrictiveness of the holding. It seems to me that had the Justices intended Belton to define "container" for all Fourth Amendment purposes, Robbins, decided the same day, would have relected this fact.

I could therefore not expand Robbins' definition of container in a non-arrest setting to encompass rainslickers, blankets, newspapers or other objects which may be used to hold other things. Such an overly broad definition would impede law enforcement officers in too many cases where no reasonable expectation of privacy exists.

This court's statement of its holding, for example, implies that the officers could have legally seized the walkie-talkie if they had discovered it lying underneath the rainslicker but not if the walkie-talkie lay within a fold of the slicker. This result is, in my view, not supported by the Fourth Amendment's concern with expectations of privacy or by the effort to create bright line distinctions for law enforcement officers.*

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* The court has responded to this hypotetical by stating that "we do not envisage as a proscribed container a mere fold that could be expected to lead to a revelation in the normal course of handling." (Emphasis added.) This formulation, though a narrowing one, appears to undermine the court's effort to create a bright line test. While I agree that how an object responds when handled is relevant in determining whether a person has a reasonable expectation of privacy in its contents, I am unwilling to adopt the court's formulation as a per se rule.

Given the procedural posture of this case, the district court has not had the opportunity to rule on the admissibility of the walkie-talkie. I would therefore remand this case to the district court for the purpose of determining whether the condition and nature of the slicker at the time of seizure indicated that defendant Jackson had manifested a reasonable expectation of privacy in its contents. See United States v. Goshorn, 528 F.2d 697, 700-01 (1st Cir. 1980).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 80-1533
through
80-1540

December 28, 1981

UNITED STATES OF AMERICA,
Appellee,

v.

ROLAND WESLEY WEBER, et al.,
Defendants, Appellants.

Appeals From The United States
District Court
[HON. EDWARD T. GIGNOUX,
U.S. District Judge]

Before
COFFIN, Chief Justice
ALDRICH and BOWES, Circuit Judges.

ON PETITIONS FOR REHEARING

PHILIP A. DeMASSA, with whom PATRICIA S. O'MARA was on brief, for appellants.

MARGARET D. McGAUGHEY, Assistant

EXHIBIT "B"

United States Attorney, with whom THOMAS E. DELAHANTY, II, United States Attorney, and JAMES W. BRANNIGAN, JR., Assistant United States Attorney, were on brief, for appellee.

December 28, 1981

ALDRICH, Senior Circuit Judge. Petitions for rehearing have been filed by all defendants and by the government with respect to those who were granted a new trial. Defendants' petition continues what, in their brief, we found objectionable, and is affirmatively unmeritorious. It is denied, as is the motion to strike that portion of the opinion entitled "The Fantasies."

The government's petition falls into two parts: for defendants Samsel, Mark Tice and Lewis, who complained of the

warrantless seizures of a chart which, by markings thereon, conclusively refuted their claim that the vessel's presence in the bay was accidental, and for defendant Jackson, whose unrolled rainslicker exposed a walkie-talkie. We consider them separately.

The Chart.

The government states, "...[6-8] charts were found lying exposed in the wheelhouse... in plain view." We do not, on the evidence, agree with that characterization. The charts may have been in plain view as charts, but not their significance. The sole testimony, that of Agent Cunniff, was,

> "I saw some charts lying on a table which I call a chart table near where the wheel of the tug was, and I collected all of these charts, seized them."

Thus it did not appear whether the charts were folded or unfolded, or even that the chart in question was on the top of what, in light of their size, was necessarily a pile. If the government has the burden of showing that "plain view" means that the significant portion of the chart in question was open and exposed, it has failed to show it.

While there have been many opinions as to what is in plain view, [1] where, as here, the government's burden is to show that a discovery was inadvertent, discovery of content by rummaging among a pile of papers is not inadvertent unless the rummaging

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[1] See United States v. Ochs, 2 Cir., 1979, 595 F.2d 1247, 1257 n.8 (listing cases), cert. denied, 444 U.S. 955.

itself was initially justified. E.g., United States v. Scios, D.C. Cir., 1978, 590 F.2d 956, 963 n. 15 (en banc); United States v. Ochs, n.1, ante ("an otherwise valid search"). Here it is apparent that the charts were seized wholesale, not as a result of inadvertent observation of "plain view" tell-tale marking on one of them. See Walter v. United States, 1980, 447 U.S. 649, 653-54.

For this there was no basis. The difficulty of justifying a warrantless seizure of a chart is well illustrated by the extensive path we followed in United States v. Miller, 1 Cir., 1978, 589 F.2d 1117, 1125-26, cert. denied, 440 U.S. 958. None of the possible justifications there indicated and found was duplication here. The government's present claim, that the

charts were taken (or, we would add, even examined) as part of Agent Cunniff's duty "to inventory and safeguard [the vessel's] contents" is purely imaginative. There was no inventorying, and the entire vessel was crewless and under guard. It seems equally cavalier to say the "charts were subject to forfeiture." This assumes the whole point. The vessel was searched for drugs the night before. The government does not show the charts were not taken for evidence by protesting that the agent did not pull out drawers and search for other evidence elsewhere.

Nor are we persuaded by the government's argument that we overlooked that the charts were "subject to administrative inspection," and misconstrued the effect of government counsel's trial concession of

defendants' standing, because "appellate Government counsel neglected to point out the obvious." If anything is obvious, it is that this was not an administrative (document) inspection. Nor do we know of any rule that, whatever may be subject to administrative inspection (assuming, which we doubt, that charts are) loses all fourth amendment protection and may be seized without a warrant, at any time, for any purpose. That would be to swallow the camel with the gnat. Matthew 23:24.

As to standing; we pointed out in our opinion, at slip p. 14, that on the evidentiary record we would have had serious doubts as to the right of Mark Tice and Lewis to object to the search of the wheelhouse, but in light of the

government's stipulation [2] they stood - we use the word advisedly - with Samsel. If the stipulation was ill advised, this is not the time to correct it even if, as the government now suggests by citing our opinion in United States v. Arra, 1 Cir., 1980, 630 F.2d 836, 841 n.6, two of the defendants might well have had a problem. In this, and as to Samsel alone, the government's attempt to limit the scope of standing vis-a-vis the disputed articles can only recall the mother who gave her

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[2] These three defendants having objected in the district court to "items seized from the Vessel," government counsel stated, "...whatever search was conducted by Mr. Cunniff on the 13th...I will concede standing on those three days for these three defendants."

daughter permission to go out to swim so long as she kept away from the water.

The Rainslicker

The uncertainties in the law in this area, leading to the initial division of the panel, have been expounded at far greater length in the several opinions in United States v. Ross, D. C. Cir., 1981, 655 F.2d 1159. In light of the Court's granting certiorari in that case, and making special inquiry as to the continued vitality of Robbins v. California (7/1/81) U.S. , 49 U.S.L.W. 4906, see 500 U.S.L.W. 3265 (10/13/81), it may be expected that whatever we now decide will have but short precedential value. In the meantime, while the majority of the panel has not changed its views based thereon, all are now persuaded by the government's

claim that Robbins' enlarged concept of containers is not retrodictated. Cf. United States v. Peltier, 1975, 422 U.S. 531, 535-39.

The evidence with respect to the rainslicker was brief. In the back of the pickup there were a number of tires. The slicker was seen "folded up, laying on top of those tires." When the pickup was surrendered to the rental agency the slicker was taken to the Marshal's office, where "it was unrolled and the radio was discovered inside it." Although, by bulk and weight, the walkie-talkie may well have made its presence, but not its identity, known before unrolling, it might be natural not to think of the slicker, particularly where so exposed, as a container protected under the prior

cases, and we cannot say the court was unwarranted in declining to suppress.

Our prior ruling as to Jackson is rescinded, and his conviction is affirmed. With this exception, both petitions for rehearing are denied.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1533

UNITED STATES OF AMERICA,
Appellee,

v.

ROLAND WESLEY WEBER,
Defendant, Appellant.

No. 80-1534

UNITED STATES OF AMERICA,
Appellee,

v.

FRED LEROY STRIMPEL, III,
Defendant, Appellant.

No. 80-1535

UNITED STATES OF AMERICA,
Appellee,

v.

JERRY SAMSEL,
Defendant, Appellant.

EXHIBIT "C"

No. 80-1536

UNITED STATES OF AMERICA,
Appellee,

v.

MARK STEVEN TICE,
Defendant, Appellant.

No. 80-1537

UNITED STATES OF AMERICA,
Appellee,

v.

FRANKLIN J. LEWIS,
Defendant, Appellant.

No. 80-1538

UNITED STATES OF AMERICA,
Appellee,

v.

ANDREW HEPBURN McDOUGAL,
Defendant, Appellant.

No. 80-1539

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL SCOTT TICE,
Defendant, Appellant.

No. 80-1540

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT EUGENE JACKSON,
Defendant, Appellant.

ORDER OF COURT

Entered January 4, 1982

There being no judge requesting a vote on the application for rehearing en banc,

It is ordered that the petition for rehearing en banc be, and the same hereby is, denied.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[cc: Messr. DeMassa and Ms. McGaughey.]

Opposition

Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1643

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROLAND WESLEY WEBER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether individuals who had been aboard a vessel but who had left the vessel well in advance of a search of the vessel's wheelhouse have "standing" to object to that search.

2. Whether the consensual inventory search of petitioner McDougal's camera case violated his Fourth Amendment rights.

3. Whether the Court's decision in *Robbins* v. *California*, No. 80-148 (July 1, 1981), should be applied retroactively to invalidate the warrantless search of a rainslicker seized from the bed of petitioner McDougal's pickup truck, where, prior to *Robbins*, the court of appeals had announced a standard under which the warrantless search was permissible.

4. Whether the arrest of petitioners Strimpel and Weber on a boating violation charge constituted an impermissible pretextual arrest that requires reversal of their convictions.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1643

ROLAND WESLEY WEBER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 668 F.2d 552. The opinion of the court of appeals on rehearing (Pet. App. B1-B11) is reported at 668 F.2d 565.[1]

JURISDICTION

The judgments of the court of appeals were entered on September 30, 1981. An amended judgment affirming the conviction of petitioner Jackson was entered on December 28, 1981, at which time the

[1] The district court's comprehensive opinion denying petitioners' motion to suppress evidence is not reported and is not reproduced in the petition appendix. The court of appeals' opinion, however, contains extensive verbatim excerpts from the district court's opinion.

petitions for rehearing were otherwise denied (Pet. App. B11). The suggestion for en banc review was denied on January 4, 1982 (Pet. App. C1-C3). The petition for a writ of certiorari was filed on March 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial upon a stipulated record, petitioners were convicted of conspiring to import, possess and distribute hashish, in violation of 21 U.S.C. 846 and 963. Petitioners Michael Tice, McDougal and Jackson were sentenced to 18 months' imprisonment and petitioners Weber and Strimpel to two years' imprisonment. The court of appeals affirmed (Pet. App. A1-A49, B1-B11).[2]

1. The evidence, as summarized by the courts below (Pet. App. A4-A23; E.R. 204-218),[3] showed that during the late summer and fall of 1978, a team consisting of a DEA agent and a Maine police investigator became suspicious about the activities of a couple who occupied a shoreside house on Little Machias Bay, Maine. The couple—one of whom was later identified as petitioner Weber—identified themselves as "Lou and Linda Walker" and held themselves out as temporary caretakers for the property. The property had been purchased the year before by one "Thomas Melrose," who had never been seen by the neghbors and whose only address was a Boston ans-

[2] Petitioners' co-defendants Mark Tice, Franklin Lewis and Jerry Samsel were also convicted of conspiring to import hashish. The court of appeals reversed their convictions and remanded for a new trial (Pet. App. A49).

[3] "E.R." refers to the Excerpt of Record filed in the court of appeals.

wering service. On several occasions during this period a Dodge pickup truck and a Chevrolet Blazer were seen on the property. Although the two vehicle had Maine registrations in different names, the handwriting on the purchase documents for the two vehicles was similar, and the police were unable to discover the owners.

On the evening of December 12, 1978, coastal wardens observed a sea-going tug, the *Tusker*, lying a distance offshore from the house under suspicion, with its lights out. A Coast Guard patrol boat and cutter were summoned. Another coastal warden observed a small boat (later determined to be a Zodiac inflatable rubber boat), also operating without lights, and carrying two people, head out from the shore, reach the *Tusker*, and depart five minutes later for shore. At this time the Coast Guard patrol boat, which had been stationed out of the view of those aboard the *Tusker*, inadvertently slipped out from behind an island, and became visible in the moonlight. An observer on shore heard the sounds of numerous metal objects being thrown overboard from the *Tusker*.

Suspecting that the Coast Guard patrol boat had been seen, the Coast Guard commander ordered the crew of that boat to board the *Tusker*. As the patrol boat turned on its lights and siren and headed toward the *Tusker*, the rubber boat, which earlier had rendezvoused with the *Tusker* and was heading back towards shore, changed its course for, and landed at, a wooded point on shore. En route, the rubber boat stopped briefly as something was thrown overboard.

Two coastal wardens and the DEA agent tracked the landing party. Following the trail left by the

party they found a canvas bag containing, *inter alia*, sheets of paper listing supplies and equipment, and including the notations "Mac" and "blue p/u."[4] The wardens eventually came upon petitioners Weber and Strimpel in the woods and arrested them for operating a boat without lights at night. Although he had been recognized by one of the wardens, petitioner Weber denied that he was "Lou Walker." The wardens searched the two men and found an air pressure gauge for a Zodiac rubber boat on Weber. Later, at the sheriff's office, the DEA agent arrested the two men for violation of the federal narcotics laws.

While the wardens were tracking Weber and Strimpel, a party from the Coast Guard patrol boat boarded the *Tusker* and found only three persons aboard: Jerry Samsel, who identified himself as the master of the boat, and crewmen Mark Tice and Franklin Lewis (see page 2, note 2, *supra*). Samsel claimed that a bad storm and mechanical difficulties had forced the boat to pull into Little Machias Bay. After examining documentation concerning the *Tusker* and her crew and conducting an unsuccessful search of the boat for marijuana bales, the Coast Guard, at Samsel's request, escorted the *Tusker* to a pier at a nearby naval station.

The following morning, December 13, the DEA agent, accompanied by coastal wardens and coast guardsmen, boarded the *Tusker* with Samsel's consent and assembled the three crew members in the

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[4] The rubber boat, almost swamped, was found later that evening off the coast. The plugs on one side of the boat had been pulled and the air compartments deflated. Divers also recovered a box containing radio equipment from the area where the occupants of the rubber boat had thrown something overboard.

ship's mess. The agent placed the three men under arrest on federal narcotics charges and declared the vessel forfeited under 21 U.S.C. 881. Before leaving the *Tusker*, the DEA agents seized some nautical charts found on a table in the *Tusker's* wheelhouse. On the drive to the local sheriff's office, Samsel informed the agent that petitioners Michael Tice and Robert Jackson had been on the *Tusker* but had left the boat two days earlier in a Zodiac.

Petitioners Michael Tice, Jackson and McDougal were later stopped in a rented blue pickup driven by McDougal. The men were arrested and taken to the Federal Building in Bangor. Before returning the truck to the rental agency, an agent removed tires that did not belong to the lessor of the truck, as well as a rolled up rainslicker belonging to Jackson, from the open bed of the truck. Inside the Marshal's office a DEA agent unrolled the rainslicker and found a walkie-talkie. At McDougal's request the agent also retrieved a case described as containing expensive photographic equipment from the front seat of the truck. The agent asked McDougal to provide him with an inventory of the contents of the case. McDougal opened the case and the agent began to list the items contained within. As the agent proceeded he found a knife, topographic maps of the area, and an unsealed manila envelope secreted in the lining of the camera case. Two sealed envelopes within the manila envelope were later opened pursuant to a warrant.

In the next few days a large quantity of hashish in sealed metal cannisters was found in various sea and shore areas in the vicinity of Little Machias Bay. On December 14, 1978, a search of the *Tusker* was conducted pursuant to warrant. No contraband was found.

2. Petitioners and their co-defendants were indicted for conspiracy to import hashish and possession of hashish with intent to distribute.[5] Following an evidentiary hearing, the district court denied various suppression motions including motions to suppress the nautical charts seized from the wheelhouse of the *Tusker*, the walkie-talkie found in Jackson's rainslicker, and the items seized from McDougal's camera case. The defendants then proceeded to trial on the conspiracy and substantive drug charges. Midway through the trial, however, the defendants entered into an agreement with the government. Pursuant to that agreement, defendants waived their right to a jury trial, agreed that their guilt was to be determined by the court on the basis of the suppression hearing transcript and the trial testimony and evidence received up to that point, and stipulated that the evidence established the guilt of each on the drug conspiracy charge. Defendants reserved the right to appeal from denial of their suppression motions. As part of the agreement, the government represented that it would dismiss the substantive drug counts. The court agreed to proceed in this manner, and the defendants were convicted based upon the evidence of record.

3. In its original opinion, the court of appeals affirmed the conviction of petitioners Weber, McDougal, Strimpel and Michael Tice. The court upheld the initial boarding of the *Tusker* as a legitimate border search (Pet. App. A29), rejected the claim that arrest of Weber and Strimpel was improper (*id.* at A30-A31), and upheld the arrest of Jackson, Michael Tice and McDougal (*id.* at A37, A39-A40). How-

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[5] Petitioners Weber, Strimpel and McDougal were also charged with violation of 18 U.S.C. 2274.

ever, the court of appeals initially reversed the conviction of Jackson, concluding that the unrolling of his rainslicker constituted an impermissible warrantless search and that the walkie-talkie discovered there should have been suppressed (Pet. App. A40-A46). The court recognized that under the analysis it had employed in *United States* v. *Goshorn*, 628 F.2d 697, 700 (1980), the warrantless search of the rainslicker was permissible. Nevertheless, relying upon the intervening plurality opinion in *Robbins* v. *California*, No. 80-148 (July 1, 1981), and the broad definition of the term "container" employed in *New York* v. *Belton*, No. 80-328 (July 1, 1981), slip op. 6 n.4, the court concluded that suppression was required.

The court also reversed the convictions of co-defendants Mark Tice, Lewis, and Samsel, finding that the district court had erred in denying their motion to suppress the nautical charts found in the wheelhouse (Pet. App. A31-A36). Although the court held that the entry upon the *Tusker* by law enforcement agents on December 13, 1981, was supported by consent, the court concluded that the consent did not extend to the seizure of charts from the wheelhouse and that no other predicate for a warrantless search was present. The court found, however, that petitioners Michael Tice and Jackson lacked standing to complain of the seizure of the charts because they had left the *Tusker* and retained no legitimate privacy interest in the area searched (Pet. App. A36). Similarly, petitioners McDougal, Strimpel and Weber were held to lack standing to challenge that seizure because at no time were they members of the crew of the *Tusker*.[6]

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[6] The court suggested that defendants Mark Tice and Lewis also lacked standing to challenge the seizure of the charts

Although the court remarked that the introduction into evidence of the walkie-talkie would likely have been deemed harmless error at any normal trial, and that the same characterization could arguably be applied to the charts, the court concluded that, because of the procedures used here, reversal of the convictions of the affected defendants was required. A new trial was required, because the defendants' "stipulations and waivers were made on the assumption and condition not merely that their right of appeal was preserved, but that the evidence was properly admissible against them" (Pet. App. A47-A48; footnote omitted). The court explained (*ibid.*): "In fairness this should mean all the evidence." [7]

Upon rehearing the court of appeals adhered to its ruling respecting the charts (Pet. App. B3-B9) but rescinded its original disposition as to Jackson and

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(Pet. App. A36) because they had demonstrated no legitimate expectation of privacy in the *Tusker's* wheelhouse, but the court declined to so hold because the government had conceded their standing. The court observed, however, that, by the terms of the stipulation, the government would be free to challenge the standing of Mark Tice or Lewis upon any retrial (*id.* at A49).

[7] Judge Coffin dissented from the reversal of petitioner Jackson's conviction, concluding that *Robbins* v. *California*, *supra*, does not compel extension of the warrant requirement to objects that are not designed to serve as containers and that the court of appeals' earlier decision in *United States* v. *Goshorn*, *supra*, therefore remained controlling and dictated affirmance of Jackson's conviction (Pet. App. A49-A58). (Petitioners have reproduced a version of the penultimate paragraph of Judge Coffin's opinion that is substantially different from the published opinion (compare 668 F.2d at 564). The discrepancy is attributable to the October 5, 1981, amendments of the court's opinion that are reflected in the published text, but not in the appendix to the petition.)

affirmed his conviction, holding that *Robbins* v. *California* should not be applied retroactively to compel suppression of the walkie-talkie discovered in Jackson's rainslicker (Pet. App. B9-B11).

ARGUMENT

1. Petitioners Jackson and Michael Tice claim (Pet. 18-22) that the courts below erred in ruling that they lacked "standing" to challenge the seizure of the nautical charts from the *Tusker*'s wheelhouse. This claim is without merit.

In order to claim the protection of the exclusionary rule, petitioners must establish that their individual rights were violated by the search of the wheelhouse and the seizure therefrom of the nautical charts. *United States* v. *Salvucci*, 448 U.S. 83, 87 n.4, 91-92 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 130 n.1, 138-139, 140 (1978). At the suppression hearing, however, petitioners failed to make a clear showing that they had either a property interest in the nautical charts or a legitimate expectation of privacy in the wheelhouse area of the *Tusker*.

Although the government stipulated at the hearing (Tr. 800-801) that petitioners Michael Tice and Jackson were crew members of the *Tusker* prior to December 11, 1978, the evidence showed that two days before the December 12 search of the *Tusker*, Tice and Jackson had left the *Tusker* with no apparent intention of returning. Indeed, following the arrest of Samsel, Mark Tice and Lewis, the DEA learned that Michael Tice and Jackson had departed the area by bus for Bangor, Maine, and had spent the evening of December 13 in a motel in Bangor (E.R. 214). The two were arrested after leaving Bangor in a pickup truck driven by petitioner Mc-

Dougal. While Tice and Jackson now claim (Pet. 19) that they had no intention of permanently abandoning the *Tusker*, they offered no testimony at the suppression hearing to support this claim. Thus, they failed to rebut the inference raised by the evidence that at the time the *Tusker* was searched, they had left the tug permanently and thus were no longer crew members. Accordingly, the district court properly found (E.R. 220 n.16):

> [W]ithout some showing of an attempt to return to the Tusker or of having left personal property there that was the subject of a search, these defendants have alleged no proprietary or possessory interest in the property seized or premises searched to support their standing.

Moreover, even had Tice and Jackson been present on the *Tusker* at the time of the search, they would not be able to challenge that search. The area from which the charts were seized—the wheelhouse—was a common area of the tug, with no specific area set aside for the private use of either Tice or Jackson. Because it was an area subject to safety and documentation inspections and to which, as petitioners admit (Pet. 19-21), all members of the crew had free access, petitioners had no reasonable expectation of privacy in the area. See *United States* v. *DeWeese*, 632 F.2d 1267 (5th Cir. 1980); *United States* v. *Arra*, 630 F.2d 836, 841 n.6 (1st Cir. 1980); cf. *United States* v. *Williams*, 617 F.2d 1063, 1084 (5th Cir. 1980) (en banc); *United States* v. *Torch*, 609 F.2d 1088, 1091 (4th Cir. 1979).[8]

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[8] Petitioners complain (Pet. 18-19) that they should not have been treated differently from co-defendants Mark Tice, Samsel and Lewis, who were present on board the *Tusker* at the time of the search and as to whom the government

2. Petitioner McDougal claims (Pet. 22-25) that evidence seized from his camera case should have been suppressed as the fruit of an illegal search. The courts below properly rejected this claim. Both the court of appeals and the district court found that McDougal consented to an inventory of the camera case (Pet. App. A38-A39; E.R. 234-235).[9] There is no occasion for further review of the concurrent finding of the courts below that McDougal consented to this inventory search.

After stopping McDougal, Michael Tice and Jackson in the blue pickup truck and arresting them, DEA agents and local police transported the three men and the truck to the Marshal's Office in Bangor (Tr. 701-706). A rental agreement found inside

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conceded "standing." However, the court of appeals did not hold that the co-defendants had standing, but merely assumed that they did because the government had so stipulated (Pet. App. A36). The government's concession as to those crew members present at the time of the search was not necessary, since, as argued above, such crew members had no expectation of privacy in the wheelhouse. Indeed, as explained above (pages 7-8, note 6), the court below expressly noted (Pet. App. A36) that, but for the government's stipulation, it might well have found that those crew members lacked "standing" to challenge the search. Petitioners have no right to the benefit of the government's gratuitous and probably erroneous concession respecting the standing of their co-defendants. In any event, because of their departure from the *Tusker*, there was ample reason to treat petitioners Tice and Jackson differently from their co-defendants.

[9] The district court concluded that the search was justified both as an inventory search and as a consent search. The district court found it unnecessary to decide whether the scope of the consent extended to the items found in the lining of the case, concluding that once the agent had noticed them he was justified in including them in the inventory.

the truck following the arrest, as well as independent police investigation, showed that the truck had been rented to one Michael Hutchins, whose whereabouts McDougal claimed not to know (Tr. 701, 704). DEA Agent Drinan contacted the rental agency and made arrangements for the return of the truck (Tr. 707, 742). Drinan then asked McDougal if there was any property he wished to recover from the truck before it was returned to the rental agency (*ibid.*). McDougal replied that there was an aluminum camera case in the cab of the truck which contained expensive camera equipment, and he asked Drinan to bring him the case (Tr. 707, 742-743). Drinan brought McDougal the camera case and asked that McDougal give him a receipt itemizing each piece of camera equipment by serial number (Tr. 707, 743-744, 755). McDougal opened the case, and together he and Drinan removed each piece of equipment (Tr. 707-708, 744-745). As Drinan was recording the serial number for each piece, he observed a bulge in the foam backing of the camera case (Tr. 708, 744-745). He lifted the foam backing, which was not glued in place, and discovered a kitchen knife, three topographical maps of the Machias Bay area, and a manila folder containing two sealed envelopes (Tr. 708, 745-746). These envelopes were later opened pursuant to a warrant.

Petitioner McDougal's suggestion (Pet. 24-25), that "[t]he facts indicate [that he maintained] an expectation of privacy * * * in the closed camera case" and that Agent Drinan undertook an impermissible warrantless exploratory search, simply ignores the concurrent finding that he consented to the inventory procedure. Significantly, McDougal did not object to the removal of the lining of the camera case to reveal the items secreted therein. Accord-

ingly, he should not now be heard to object to the completion of the inventory.

Even if McDougal had not consented to the inventory, in the circumstances of this case, the procedure would have been justified. It is settled that the police, as part of their community caretaking functions, may secure and inventory an impounded automobile's contents. *South Dakota* v. *Opperman*, 428 U.S. 364, 368-369 (1976); *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973); *United States* v. *Smith*, 621 F.2d 483, 488 (2d Cir. 1980), cert. denied, 449 U.S. 1086 (1981); *United States* v. *Staller*, 616 F.2d 1284, 1289 (5th Cir.), cert. denied, 449 U.S. 869 (1980). The purpose of such inventory searches is to protect the owner's property while it remains in police custody, to protect the police against claims or disputes over lost or stolen property, and to protect the police from potential danger. *South Dakota* v. *Opperman, supra*, 428 U.S. at 369; *United States* v. *Strahan*, No. 81-1440 (1st Cir. Mar. 23, 1982), slip op. 5-6; *United States* v. *Staller, supra*, 616 F.2d at 1289; *United States* v. *Pappas*, 613 F.2d 324, 330 (1st Cir. 1979). Here, after arresting McDougal and his companions and impounding the rental pickup truck, DEA agents made plans for the return of the truck to the rental agency. When McDougal asked the agent to retrieve a camera case which he claimed contained expensive camera equipment, it was entirely proper for the agent to conduct a complete inventory of the valuable items inside the unlocked case. Such an inventory served to protect the case's contents while McDougal was incarcerated in Bangor jail, and to safeguard the police from claims by McDougal that camera equipment had not been returned to him. In order to achieve the purposes of the inventory search, it was incumbent upon Agent Drinan to include the con-

tents of the bulge in the case lining in his listing.[10] Moreover, the truck from which the camera case was seized had been rented to one Michael Hutchins. In light of McDougal's professed ignorance as to Hutchins' whereabouts, Agent Drinan had to consider the possibility that the camera case belonged to someone other than McDougal. A complete inventory was necessary to protect the possible ownership interests of Hutchins or another third party. Cf. *United States* v. *Stocks*, 594 F.2d 113 (5th Cir. 1979).

3. Petitioner Jackson claims (Pet. 25-27) that upon rehearing the court of appeals improperly declined to apply retroactively the decision in *Robbins* v. *California*, No. 80-148 (July 1, 1981), so as to invalidate the warrantless seizure of the walkie-talkie found inside the rainslicker.[11] As the court below acknowledged (Pet. App. A41-A42), First Circuit law prior to *Robbins* v. *California* (see *United States* v. *Goshorn*, 628 F.2d 697 (1980)) would lead a law enforcement officer reasonably to believe that unrolling of a rainslicker without a warrant was permissible. Whether a decision resolving a previously unsettled area of Fourth Amendment law should be given retroactive application is an issue currently before the Court in *United States* v. *Johnson*, No. 80-1608 (argued Feb. 24, 1982). For the reasons

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[10] Even if Agent Drinan suspected that the bulge contained evidence of the crime under investigation, the validity of an inventory search which is otherwise reasonable "is not vitiated by a police officer's suspicion that * * * evidence may be found." *United States* v. *Staller*, *supra*, 616 F.2d at 1290, quoting *United States* v. *Prescott*, 599 F.2d 103, 106 (5th Cir. 1979); see also *United States* v. *Chadwick*, 532 F.2d 773, 783 (1st Cir. 1976), aff'd on other grounds, 433 U.S. 1 (1977).

[11] Petitioners refer to this case as *United States* v. *Robbins*.

outlined in our brief in that case (pages 14-34), we believe that the court of appeals in the instant case correctly declined to give the Court's decision in *Robbins* v. *California* retroactive application.[12]

Retroactive application of *Robbins* v. *California* to require suppression is especially inappropriate because there was no majority opinion in that case, and because it is far from clear that *Robbins* dictates suppression on facts similar to this case, even prospectively. The court below reached its contrary initial conclusion by treating the plurality opinion in *Robbins* as establishing the controlling legal principles, and by invoking the extraordinarily broad definition of "container" employed in *New York* v. *Belton*, No. 80-328 (July 1, 1981), slip op. 6 n.4, with respect to vehicle searches incident to an arrest. The court thus concluded that Jackson's rainslicker was a "container" which could not be searched without a warrant because it was closed and opaque (Pet. App. A42-A46). It is far from clear, however, that the *Robbins* plurality would (in what would seem to be *reductio ad absurdum*) have included rolled up rainslickers in their definition of "containers" entitled to Fourth Amendment protection. As Judge Coffin noted in his dissent from the original panel opinion (Pet. App. A55-A56), the broad definition of containers employed in *Belton* was designed to define expansively police search authority incident to arrest, and there is little reason to assume that it should be imported to govern and limit the different context of investigatory searches. In addition, as Judge Coffin observed (*id.* at A55):

> every one of the many references to "container" in all the opinions in *Robbins* describes objects

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[12] A copy of the government's brief in *United States* v. *Johnson* has been provided petitioners' counsel.

> fabricated and particularly suitable for the sole purpose of containing other things. Justice Powell, in his concurring opinion, seems to corroborate this understanding when he writes: "In accordance with the plurality's usage I use the term 'container' to include any and all packages, bags, boxes, tins, bottles and the like." *Robbins* [v. *California*], *supra*, [slip op. 1 n.1] (Powell, J., concurring in the judgment).

Even if the *Robbins* plurality would have included a rainslicker as a container that cannot ordinarily be searched without a warrant, that view forms no part of the holding of the Court and did not require the court of appeals to ignore its own decision in *Goshorn*.[13]

4. Petitioners Strimpel and Weber allege (Pet. 28-29) that their convictions should be overturned because their original arrest for operating a boat without lights at night was merely a pretext for gathering evidence of the drug conspiracy. This claim is frivolous.

As an initial matter, it is settled that an illegal arrest is neither a bar to a subsequent prosecution nor a defense to a valid conviction. *United States* v. *Crews*, 445 U.S. 463, 474 (1980); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975). In any event, the instant arrest was proper. Maine law permits

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[13] The underlying warrant requirement issue in this case is similar to that presented in *United States* v. *Ross*, No. 80-2209 (argued Mar. 1, 1982). In its present posture, however, this case presents only the retroactivity question. There is accordingly no need to hold the petition pending disposition of *Ross*. On the underlying warrant requirement issue, moreover, we note that, although the record is unclear as to the circumstances in which the rainslicker was unrolled, the search may well also have been justified as an inventory search. See pages 13-14, *supra*.

law enforcement officers to make a warrantless arrest for misdemeanors committed in their presence. See *United States* v. *Miller*, 589 F.2d 1117, 1128 (1st Cir. 1978). Under Maine law, the failure of a vessel to use its navigational lights when operating between sunset and sunrise is punishable as a misdemeanor.[14] Here, on the evening of December 12, Coastal Wardens Fetterman and Mackeen both observed a Zodiac containing two men operating in Little Machias Bay without the lights required by statute. Later events showed Strimpel and Weber to be the operators of the Zodiac. The coastal wardens were accordingly entitled to arrest the two men. And even if arrest is not the routine response to navigation law violations, the wardens had ample reason to treat petitioners differently from others suspected only of similar offenses. Warden Mackeen recognized petitioner Weber as "Lou Walker," who had previously represented that he would soon be leaving the area. It was reasonable to doubt that he would respond to a mere citation. In addition, Weber and Strimpel's evasive conduct from the time they were observed set them apart from other boating law violators.

Moreover, as the court below found (Pet. App. A30-A31), at the time the warden arrested Strimpel and Weber for the boating violation, they also had probable cause to believe the two men were involved in drug smuggling. On a winter night Strimpel and Weber had made their way stealthily by boat from a suspected drug off-loading site, to a vessel, the *Tusker*, that the wardens reasonably believed was

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[14] See Me. Rev. Stat. Ann. tit. 12, § 2074(1)(A) (repealed 1979); see also 46 U.S.C. 526b. The currently applicable provisions are Me. Rev. Stat. Ann. tit. 12, § 7801(16)(A) (1981), which incorporates by reference 46 U.S.C. 1454(a)(2) and 46 C.F.R. Subpart 25.05.

delivering illegal cargo. After a brief rendezvous with the *Tusker*, the two men headed back to shore. However, when the Coast Guard patrol boat turned on its lights and siren and headed towards the *Tusker*, Strimpel and Weber changed their course and headed for a wooded point on shore, after briefly stopping to throw something overboard. They then scuttled the boat and fled into the woods. On these facts, coupled with Weber's inconsistent self-identifications, the wardens had ample probable cause to arrest Weber and Strimpel for violation of the federal drug laws. The arrests were not, accordingly, mere pretexts for beginning an investigation, as petitioners claim (Pet. 29). Petitioners' suggestion that probable cause to suspect their involvement in drug smuggling did not arise until the hashish was discovered was properly rejected by the court of appeals (Pet. App. A26-A27, A31).[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982

[15] Equally meritless is petitioner McDougal's claim (Pet. 29-30) that his arrest was unsupported by probable cause. As is clear from the facts recited by the court below (see Pet. App. A39-A40), the DEA agents and Bangor Police had sufficient probable cause to arrest McDougal.

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